

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

YVONNE A'RAE LAISURE-RADKE,
et al.,

Plaintiffs,

v.

PAR PHARMACEUTICAL, INC., *et al.*,

Defendants.

CASE NO. C03-3654RSM

ORDER DENYING MOTION FOR
SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the Court on defendants' Motion for Summary Judgment pertaining to plaintiff's product liability claims. (Dkt. #117). Defendants argue that, to the extent that plaintiff's failure to warn claims are based on common law theories of negligence, those claims are preempted by the Washington Product Liability Act ("WLAP"). Defendants further argue that plaintiff cannot establish proximate cause between the alleged failure to warn and her husband's death, and therefore, her claims should be dismissed as a matter of law. Finally, defendants argue that Washington law prohibits punitive damages in product liability cases.

Plaintiff opposes the motion, asserting that there are questions of fact as to whether defendants should have altered their label, or taken other steps to convey meaningful warnings about the increased

1 association of antidepressants such as fluoxetine and suicidality. (Dkt. #129). Therefore, plaintiff
2 asserts that summary judgment is not appropriate.

3 For the reasons set forth below, the Court agrees with plaintiff and DENIES defendants'
4 motion for summary judgment.

5 **II. DISCUSSION**

6 **A. Background**

7 Plaintiff, Yvonne A'Rae Laisure-Radke, brings this lawsuit on behalf of herself and as
8 individual representative of her late husband's estate. She alleges that her husband, Douglas Radke,
9 committed suicide while under the influence of the antidepressant drug fluoxetine, which is the generic
10 version of Eli Lilly's Prozac. Defendants manufacture, distribute and market the generic drug in
11 question in this case. Plaintiff essentially asserts that defendants were aware of an increased risk of
12 suicidality in users of the class of antidepressant drugs within which Fluoxetine lies, known as selective
13 serotonin reuptake inhibitors ("SSRIs"), well before the death of Ms. Laisure-Radke's husband, but
14 did not adequately warn of that risk.

15 Douglas Radke was a correctional officer in Whatcom County, Washington. Throughout his
16 life he struggled with alcoholism and depression, although he had been sober for the last 17 months of
17 his life. At the time of his death, Mr. Radke was married to plaintiff, and supported two children from
18 his previous marriage to Eva Browning.

19 In March of 2000, Mr. Radke began individual counseling sessions for marital problems and
20 other stresses in his life with Priscilla Tragessor Hone, Ph.D., a chemical dependency specialist. He
21 stopped drinking in June of 2000. Although he apparently experienced intense cravings, he remained
22 sober, with the exception of one beer on New Year's Eve, until he died.

23 On October 26, 2000, Mr. Radke began counseling sessions with Michael Praetzel, a clinical
24 social worker. After seeing Mr. Radke again on October 31, 2000, Mr. Praetzel diagnosed him with

1 general anxiety disorder, depression and high levels of stress.

2 On January 31, 2001, Mr. Radke was assessed for his alcoholism by Dr. Portman, a
3 psychologist. Dr. Portman referred Mr. Radke to an intensive outpatient program for his alcoholism.
4 During that time, it appears that Mr. Radke was also taking Atenolol and Wellbutrin for his anxiety
5 and depression.

6 On January 23, 2001, during a doctor's appointment with Dr. Moore, who had been Mr.
7 Radke's physician since 1991, Mr. Radke reported that he believed he was experiencing sweat
8 outbreaks and shakes as side effects of the medication he was taking. Dr. Moore discontinued Mr.
9 Radke's prescriptions for Atenolol and Wellbutrin, and prescribed Prozac. He also advised Mr. Radke
10 to seek assistance from a psychiatrist, recommending two choices. Mr. Radke apparently never saw
11 either one.

12 On February 8, 2001, Mr. Radke saw Dr. Moore for a follow-up visit for his depression. Dr.
13 Moore continued his prescription for Prozac.

14 On March 22, 2001, Mr. Radke saw Mr. Praetzel, and apparently told him that he felt more
15 balanced on Prozac. However, he also reported that he had been having homicidal tendencies. As a
16 result, Mr. Praetzel also recommended that Mr. Radke see one of the two psychiatrists Dr. Moore had
17 recommended, but again Mr. Radke failed to do so.

18 On April 16, 2001, Dr. Moore increased Mr. Radke's Prozac prescription from 20 mg once a
19 day to 40 mg once a day. That was Mr. Radke's last visit to Dr. Moore.

20 On August 2, 2001, the Food and Drug Administration ("FDA") approved defendants' generic
21 fluoxetine 40 mg capsules. The approved label included information relating to suicide. Under the
22 "Precautions" section, it read:

23 Suicide – The possibility of a suicide attempt is inherent in depression and may
24 persist until significant remission occurs. Close supervision of high risk patients
25 should accompany initial drug therapy. Prescriptions for fluoxetine should be
written for the smallest quantity consistent with good patient management in order

1 to reduce the risk of overdose.

2 In addition, "suicide attempt" was listed as an adverse event reported during clinical trials.

3 On August 30, 2001, Mr. Radke refilled his Prozac prescription and received defendants'
4 generic fluoxetine 40 mg capsules. Shortly thereafter, he began voicing thoughts of suicide. Plaintiff,
5 Mr. Praetzel, Dr. Moore, Mr. Radke's children and other members of Mr. Radke's family all testify
6 that he had never voiced any notions of suicide or suicidal ideation prior to that time period.

7 On October 8, 2001, Mr. Radke saw a counselor at Chambers and Wells. That counselor
8 apparently recommended that Mr. Radke see a psychiatrist. Again, Mr. Radke chose not to do so.

9 On October 11, 2001, Mr. Radke refilled his Prozac prescription and received generic
10 fluoxetine.

11 On November 15, 2001, Mr. Radke filled his Prozac prescription and received generic
12 fluoxetine.

13 On November 18, 2001, Mr. Radke packed some clothes and left the state. Three days later,
14 he apparently called his brother and told him that he was headed east, with no particular destination in
15 mind, and that he intended to get a job and send money home for child support.

16 On November 27, 2001, a rancher in Kansas found Mr. Radke's car at the entrance to his
17 pasture. Tragically, sometime earlier, Mr. Radke had climbed into the trunk and shot himself in the
18 head. He left notes for "the person that found him," his wife, his children, his parents, and one of his
19 former colleagues, explaining that he had struggled with mental illness, he was hearing voices that
20 seemed to control him, and he had given all he could but it just wasn't enough. The instant lawsuit
21 followed.

22 In her Complaint, plaintiff makes three claims for relief, including:

23 FIRST: All defendants are jointly and severally liable for marketing a defective
24 product with inadequate and/or legally defective labeling and for marketing with
misrepresentations

1 SECOND: Defendants' conduct is unreasonable, or negligent, and was a proximate
2 cause of Plaintiff's decedent's injuries and death. The manufacturers were all
3 negligent for failing to warn, failing to test or otherwise to investigate the
association between FLUOXETINE, akathisia, psychosis, and suicide, and for
misrepresenting and over-promoting "FLUOXETINE."

4 THIRD: Defendants' [sic] are liable because "FLUOXETINE" was defective and
5 potentially harmful to its consumers/users, including Plaintiff [sic] decedent, and
6 because adequate warnings were not provided with the product or after
manufacture, and as such was unsafe to an extent beyond that contemplated by an
ordinary user and consumer set forth in RCW 7.72.030.

7 (Dkt. #39 at 11).

8 **B. Common Law Negligence Claims**

9 As a threshold matter, the Court addresses defendants' argument that product-related,
10 common law liability claims filed after July 26, 1981, are preempted by the WPLA. Defendants assert
11 that plaintiff's claims for negligent failure to warn, negligent failure to test or otherwise investigate the
12 association between fluoxetine, akathasia, psychosis, and suicide, negligent misrepresentation and
13 negligent over promotion, which all appear to be based on common law negligence theories, must be
14 dismissed as a matter of law. Defendants further assert that plaintiff's claim for negligent marketing of
15 a defective product with inadequate and/or legally defective labeling, which also appears to be based
16 on a common law theory of negligence, should also be dismissed as a matter of law. The Court
17 agrees.

18 As the Supreme Court of Washington explained in *Washington Water Power Co. v. Graybar*
19 *Elec. Co.*, 112 Wn. 2d 847, 850-55(1989), the WPLA preempts traditional common law remedies for
20 product-related harms. Such "[a] claim previously based on negligence is within the definition of a
21 product liability claim. Since this present cause of action is predicated upon a failure to warn by a
22 product manufacturer, any negligence cause of action therefor is now preempted by the [W]PLA.
23 Therefore, this product liability claim cannot be maintained on a common law negligence theory."
24 *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 323 (1993).

1 Accordingly, the Court DISMISSES plaintiff's claims for negligent failure to warn, negligent
2 failure to test or otherwise investigate the association between fluoxetine, akathasia, psychosis, and
3 suicide, negligent misrepresentation, negligent over promotion and negligent marketing of a defective
4 product with inadequate and/or legally defective labeling, to the extent that they are based on a
5 common law theory of negligence.

6 **C. Washington State Product Liability Claims**

7 The Court now turns to defendants' arguments pertaining to claims arising under the WPLA.

8 *1. Defendant's Compliance with Labeling Regulations*

9 Defendants first argue that plaintiff's failure to warn claim should be dismissed because
10 defendants were forbidden to alter their label from that of the reference listed drug, Prozac. The
11 Court has already addressed this argument in its Order on defendants' motion for summary judgment
12 based on the preemption doctrine. (Dkt. #165). In that motion, relying on 21 U.S.C.
13 § 355(j)(2)(A)(v) and 21 C.F.R. § 314.94(a)(8), defendants argued that a "generic manufacturer
14 simply cannot deviate its labeling from that of a reference listed drug." (Dkt. #113 at 23). The Court
15 agreed that as part of its abbreviated new drug application ("ANDA"), a generic manufacturer must
16 submit information that its proposed label is identical to that of the reference listed drug. (Dkt. #165
17 at 5). However, the Court found defendants' argument flawed with respect to manufacturers that hold
18 approved ANDAs, determining that once the ANDA is approved, generic manufacturers have the
19 same power and duty to add or strengthen their warnings, as do the manufacturers of pioneer drugs,
20 and therefore, the same liability. (Dkt. #165 at 6-7). The Court further found that once a generic drug
21 manufacturer holds an approved ANDA for a particular product, it can add or strengthen a
22 contraindication, warning, precaution or adverse reaction at any time without prior FDA approval.
23 (Dkt. #165 at 8). Thus, the Court again denies defendants' motion for summary judgment on that
24 basis.

1 2. RCW 7.72.030(2)

2 Before addressing plaintiff's product liability claims under RCW 7.72.030(1), the Court
3 addresses plaintiff's apparent argument that a strict liability standard should apply to this case because
4 RCW 7.72.030(2) mandates such a standard. RCW 7.72.030 (2) provides:

5 (2) A product manufacturer is subject to strict liability to a claimant if the claimant's
6 harm was proximately caused by the fact that the product was not reasonably safe
7 in construction or not reasonably safe because it did not conform to the
8 manufacturer's express warranty or to the implied warranties under Title 62A RCW.

9 (a) A product is not reasonably safe in construction if, when the product
10 left the control of the manufacturer, the product deviated in some
11 material way from the design specifications or performance standards
12 of the manufacturer, or deviated in some material way from otherwise
13 identical units of the same product line.

14 (b) A product does not conform to the express warranty of the
15 manufacturer if it is made part of the basis of the bargain and relates to
16 a material fact or facts concerning the product and the express warranty
17 proved to be untrue.

18 (c) Whether or not a product conforms to an implied warranty created
19 under Title 62A RCW shall be determined under that title.

20 RCW 7.72.030(2)(a)-(c). It is not clear to this Court how that section applies to the instant case.

21 Nothing in plaintiff's First Amended Complaint indicates that plaintiff alleges a breach of any
22 warranty, express or implied. (*See* Dkt. #39). Indeed, in her Response to the instant motion, plaintiff
23 fails to identify any alleged breach of warranty either express or implied. The Court recognizes that
24 under Title 62A, implied warranties include the implied warranty of merchantability, and that the
25 warranty of merchantability encompasses considerations of the adequacy of the package and label.
26 RCW 62A.2.314(2); *Hue v. Farmboy Spray Co.*, 127 Wn. 2d 67, 89-90 (1995). However, if plaintiff
believes she has raised a breach of implied warranty claim, she has completely failed to indicate which
implied warranty was not honored by defendants, nor has she alleged any facts in support of such a
claim, and this Court will not presume to raise a claim that plaintiff failed to allege. *See Hue*, 127 Wn.
2d at 90 (explaining that the court cannot make such a presumption). Accordingly, the Court rejects

1 plaintiff's arguments based on RCW 7.72.030(2).

2 *3. Inadequate Labeling/Failure to Warn Claims*

3 Defendants next argue that, with respect to plaintiff's WPLA failure to warn claim, plaintiff has
4 failed to demonstrate proximate cause, as she has failed to establish any causal link between the
5 alleged failure to warn and her alleged injuries. Plaintiff responds that a question of material fact exists
6 as to whether the warnings defendants provided were adequate, and whether defendants acted
7 reasonably in light of the information known about increased risk of suicidality and SSRIs at the time
8 of manufacture.

9 RCW 7.72.030 states in pertinent part:

10 A product manufacturer is subject to liability to a claimant if the claimant's harm
11 was proximately caused by the negligence of the manufacturer in that the product
12 was not reasonably safe as designed or not reasonably safe because adequate
13 warnings or instructions were not provided.

14 . . .

15 (b) A product is not reasonably safe because adequate warnings or instructions
16 were not provided with the product, if, at the time of manufacture, the likelihood
17 that the product would cause the claimant's harm or similar harms, and the
18 seriousness of those harms, rendered the warnings or instructions of the
19 manufacturer inadequate and the manufacturer could have provided the warnings or
20 instructions which the claimant alleges would have been adequate.

21 (c) A product is not reasonably safe because adequate warnings or instructions were
22 not provided after the product was manufactured where a manufacturer learned or
23 where a reasonably prudent manufacturer should have learned about a danger
24 connected with the product after it was manufactured. In such a case, the
25 manufacturer is under a duty to act with regard to issuing warnings or instructions
26 concerning the danger in the manner that a reasonably prudent manufacturer would
act in the same or similar circumstances. This duty is satisfied if the manufacturer
exercises reasonable care to inform product users.

21 RCW 7.72.030(1)(b). It appears from the Third Claim for Relief set forth in plaintiff's First Amended
22 Complaint that both subparagraph (b) and (c) are alleged bases for her claims. (Dkt. #39 at 11)
23 (alleging that adequate warnings were not provided with the product or after manufacture).

24 Until recently, it appeared that Washington courts applied a strict liability standard to all failure

1 to warn and inadequate warning claims brought under RCW 7.72.030(1)(b). *Ayers v. Johnson &*
2 *Johnson Baby Prods. Co.*, 117 Wn.2d 747, 763 (1991); *Anderson v. Weslo, Inc., et al.*, 70 Wn. App.
3 829, 838 (1995).¹ The Ninth Circuit Court of Appeals had also determined that such claims would
4 likely be examined under a strict liability standard. *Transue v. Aesthetech Corp., et al.*, 341 F.3d 911,
5 918-19 (9th Cir. 2003). However, in *Estate of LaMontagne v. Bristol Meyers Squibb, et al.*, 127 Wn.
6 App. 335 (2005), the Washington State Court of Appeals firmly stated that “[w]hether a prescription
7 drug manufacturer provides adequate warning to physicians is governed by the negligence standard
8 under the *Restatement (Second) of Torts* § 402A, cmt. k (1965),” thereby distinguishing prescription
9 drug products from the consumer products examined in *Ayers* and *Anderson, supra*. *LaMontagne*,
10 127 Wn. App. at 343 (explaining that comment k, adopted by the Washington Supreme Court in
11 *Terhune v. A. H. Robins, Co.*, 90 Wn.2d 9, 12-13 (1978), is an exception to strict liability for
12 unavoidably unsafe products); *see also Ruiz-Guzman v. Amvac Chem. Corp.*, 141 Wn.2d 493 (2000);
13 *Young v. Key Pharmaceuticals*, 130 Wn. 2d 160, 166-67 (1996). In *Terhune*, the court also made
14 clear that where the product can be sold only under prescription, the duty to warn runs only to the
15 physician, not to the ultimate consumer. *Terhune*, 90 Wn.2d at 13, 17. Thus, the Court first
16 addresses whether defendants’ label provided warnings that were adequate as a matter of law.

17 Like RCW 7.72.030(1), comment k imposes a duty on a drug manufacturer to warn of the
18 known dangers and risks associated with prescription drugs. It states:

19 *Unavoidably unsafe products.* There are some products which, in the present state
20 of human knowledge, are quite incapable of being made safe for their intended and
21 ordinary use. These are especially common in the field of drugs. An outstanding
22 example is the vaccine for the Pasteur treatment of rabies, which not uncommonly
23 leads to very serious and damaging consequences when it is injected. Since the
disease itself invariably leads to a dreadful death, both the marketing and the use of
the vaccine are fully justified, notwithstanding the unavoidable high degree of risk
which they involve. Such a product, properly prepared, and accompanied by proper

24 ¹ The state Supreme Court has distinguished subparagraph (b) from subparagraph (c), “which
25 clearly embraces a negligence standard.” *Ayers*, 117 Wn.2d at 765.

1 directions and warning, is not defective, nor is it unreasonably dangerous. The same
2 is true of many other drugs, vaccines, and the like, many of which for this very
3 reason cannot legally be sold except to physicians, or under the prescription of a
4 physician. It is also true in particular of many new or experimental drugs as to
5 which, because of lack of time and opportunity for sufficient medical experience,
6 there can be no assurance of safety, or perhaps even of purity of ingredients, but
7 such experience as there is justifies the marketing and use of the drug
notwithstanding a medically recognizable risk. The seller of such products, again
with the qualification that they are properly prepared and marketed, and proper
warning is given, where the situation calls for it, is not to be held to strict liability for
unfortunate consequences attending their use, merely because he has undertaken to
supply the public with an apparently useful and desirable product, attended with a
known but apparently reasonable risk.

8 Restatement (Second) of Torts § 402A, cmt. k (1965). The comment further provides that a warning
9 for a prescription drug may be adequate as a matter of law if it provides specific and detailed
10 information about the risks of using the drug. *Id.*

11 To determine whether a warning is adequate requires an analysis of the warnings as a whole
12 and the language used in the package insert. *LaMontagne*, 127 Wn. App. at 344. The court must
13 examine the meaning and context of the language and the manner of expression to determine if the
14 warning is accurate, clear and consistent and whether the warning portrays the risks involved in taking
15 the prescription drug. *Martin v. Hacker*, 83 N.Y.2d 1, 10-11, 628 N.E.2d 1308, 607 N.Y.S.2d 598
16 (1993); *cf. Little v. PPG Indus., Inc.*, 92 Wn.2d 118 (1979) (determining the adequacy of a warning
17 by examining whether the warning sufficiently attracted the attention of the product users and
18 informed them of the dangers of the product).

19 In addition, in addressing whether a drug manufacturer has met its duty to give adequate
20 warnings for prescription drugs, Washington has adopted the “learned intermediary” doctrine.
21 *LaMontagne*, 127 Wn. App. at 345; *Terhune*, 90 Wn.2d at 13-14. Under the learned intermediary
22 doctrine a drug manufacturer satisfies its duty “to warn of dangers involved in use of a product . . . if it
23 gives adequate warning to the physician who prescribes it.” *Id.* at 13. The *Terhune* Court explained
24 that when a product that is available only through prescription

1 is properly labeled and carries the necessary instructions and warnings to fully
2 apprise the physician of the proper procedures for use and the dangers involved, the
3 manufacturer may reasonably assume that the physician will exercise informed
judgment thereby gained in conjunction with his own independent learning, in the
best interest of the patient.

4 *Terhune*, 90 Wn.2d at 14.

5 Finally, because FDA regulations provide only the minimum requirements for drug
6 manufacturers, compliance with those regulations does not necessarily establish that the warnings at
7 issue were adequate. *See Wash. State Physicians Ins. Exchange & Assoc. v. Fisons Corp.*, 122 Wn.2d
8 299, 328-29 (1993).

9 In the instant case, defendants provided the following suicide-related warnings on their label.
10 Under the “Precautions” section, it read:

11 Suicide – The possibility of a suicide attempt is inherent in depression and may
12 persist until significant remission occurs. Close supervision of high risk patients
13 should accompany initial drug therapy. Prescriptions for fluoxetine should be
written for the smallest quantity consistent with good patient management in order
to reduce the risk of overdose.

14 In addition, “suicide attempt” was listed as an adverse event reported during clinical trials. Plaintiff
15 argues that in light of the information available at the time of manufacture, and after manufacture,
16 there should have been a stronger warning, such as the Black Box warning now required on all SSRIs,
17 which indicates an increased risk for suicidal behavior in children and adolescents who are being
18 treated with those drugs.

19 Defendants first argue that plaintiff’s claim fails because she has not articulated what warning
20 she believes would have been adequate. The Court finds this argument without basis. In *Ayers*,
21 *supra*, the Supreme Court of Washington rejected a nearly identical argument, holding “that the
22 language of RCW 7.72.030(1)(b) does not require a claimant to establish the exact wording of the
23 alternative warning. The statute’s requirement . . . is satisfied if the claimant specifies the substance of
24 the warning.” *Ayers*, 117 Wn.2d at 756. Plaintiff has done so in the instant case.

1 Defendants next argue plaintiff has failed to specify any new information that defendants
2 learned or should have learned after manufacture, and that even if there was such information,
3 defendants could not have provided a stronger warning based on such information within the four
4 month window it had between the date it was approved for marketing and the date that Mr. Radke
5 committed suicide. Defendants assert that for these reasons, plaintiff's claims fail as a matter of law.
6 The Court disagrees.

7 First, the Court has already rejected defendants' inability to warn without prior FDA approval
8 argument above, and, in more detail, in its previous Order denying defendants' motion for summary
9 judgment based on the preemption doctrine. Second, plaintiff has provided expert testimony
10 supported by numerous medical journal articles, case studies, and other documents, raising a genuine
11 issue of material fact as to whether defendants were aware or should have been aware of an increased
12 risk of suicidality in patients using SSRIs. Indeed, defendants themselves note that starting in 1991,
13 after Prozac was approved for market, the FDA began receiving requests for warnings of such a risk,
14 which eventually led to further investigation by the FDA and SSRI manufacturers. Moreover, Dr.
15 Moore testified that he was aware of such increased risk as early as the late 80s or early 90s, and
16 warned his patients of that risk at the time. For these reasons, the Court finds that defendants' label
17 cannot be deemed adequate as a matter of law, and that the adequacy question is more appropriately
18 resolved by the jury.

19 The Court next addresses the issue of proximate cause, which can be resolved as a matter of
20 law when no reasonable persons would differ. *Lunt v. Mt. Spokane Skiing Corp.*, 62 Wn. App. 353,
21 362, *review denied*, 118 Wn.2d 1007 (1991). To show proximate causation, the plaintiff must show
22 both cause in fact and legal causation. *Ayers*, 117 Wn.2d at 753; *Baughn v. Honda Motor Co.*, 107
23 Wn.2d 127, 142 (1986). "Cause in fact refers to the 'but for' consequences of an act – the physical
24 connection between an act and an injury." *Hartley v. State*, 103 Wn.2d 768, 778 (1985). Legal

1 causation depends on considerations of “logic, common sense, justice, policy, and precedent.” *King v.*
2 *Seattle*, 84 Wn.2d 239, 250 (1974). It involves the “determination of whether liability *should* attach as
3 a matter of law given the existence of cause in fact.” *Hartley*, 103 Wn.2d at 779 (emphasis in
4 original).

5 Cause in fact is usually a jury question. *Baughn*, 107 Wn.2d at 142. However, it may
6 become a question of law “when the facts are undisputed and inferences therefrom are plain and
7 incapable of reasonable doubt or differences of opinion. . . .” *Id.* Defendants argue that plaintiff fails
8 to appreciate the importance of the learned intermediary doctrine. Defendants believe that because Dr.
9 Moore was aware of the data pertaining to the increased risk of suicidality and SSRIs both now and at
10 the time he was prescribing Prozac to Mr. Radke, but would still prescribe Prozac to Mr. Radke if he
11 were alive today, plaintiff cannot meet her burden of proof as a matter of law. Again, the Court
12 disagrees. Dr. Moore’s deposition does not indicate that he would continue prescribing Prozac for
13 Mr. Radke had there been adequate warnings pertaining to an increase in suicidality associated with
14 that drug. Instead, Dr. Moore simply states that once the FDA determined that the data was
15 insufficient to prove such a link, he determined that he was “probably not increasing the risk of suicide
16 in [his] depressed patients by using Prozac, but that hopefully, if [he was] doing the right things, [he
17 was] diminishing that risk.” (Dkt. #115, Ex. U at 112). Given the conditional language of that
18 statement, there appears to be a genuine issue regarding whether a different, increased warning would
19 have persuaded Dr. Moore to take a different course of action with Mr. Radke. Accordingly, the
20 Court finds that the issue of cause in fact must be left to the jury.

21 Finally, the Court turns to the question of legal causation. In conclusory fashion, defendants
22 argue that logic, common sense, justice, policy and precedent all weigh in favor of awarding
23 defendants summary judgment. However, this Court believes that Washington case law, particularly
24 those cases cited above, supports imposing a duty of manufacturers of generic prescription drugs, just
25

1 as it would impose liability on a manufacturer of a reference listed drug if a factfinder determined that
2 it had failed to adequately warn physicians of a particular risk of harm to their patients. Thus, this
3 Court finds that should a jury find causation in fact, liability should attach to defendants.

4 **D. Punitive Damages**

5 Finally, defendant argues that plaintiff's punitive damages request should be dismissed because
6 Washington law prohibits punitive damages in a product liability action. Plaintiff has failed to respond
7 to this argument. Accordingly, the Court deems it unopposed, and will dismiss plaintiff's request for
8 punitive damages.

9 **III. CONCLUSION**

10 Having reviewed defendants' motion for summary judgment, plaintiff's response, defendants'
11 reply, the numerous exhibits and declarations in support of those briefs, and the remainder of the
12 record, the Court hereby finds and ORDERS:

13 (1) Defendants' Motion for Summary Judgment (Dkt. #117) is DENIED.

14 (2) Any request for punitive damages by plaintiff will be DENIED.

15 (3) Defendants' pending Motion to Dismiss (Dkt. #151) and Motion to Exclude Testimony of
16 Witnesses Not Disclosed During Discovery (Dkt. #154) will be addressed in separate Orders.

17 (4) The Clerk shall forward a copy of this Order to all counsel of record.

18 DATED this 31st day of March, 2006.

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21 RICARDO S. MARTINEZ
22 UNITED STATES DISTRICT JUDGE
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